appropriate to each community, and far more effectively than federal or state regulation has done to date.[37] Indeed, local franchising has already given residents, schools and local governments on-ramps and off-ramps on the information highway that would not otherwise have existed.

The franchising process enables local authorities to ensure that cable service is available to vital public institutions that probably could not afford such services otherwise, such as schools and local governments. For example, today far more classrooms have access to cable service than have telephones.[38] This is not because cable companies are more altruistic than telephone companies. Rather, classrooms are able to access the cable network because local governments have required them to do so in cable franchises, as part of the fair market value the operators contribute for use of local public rights-of-way.[39]

In contrast, the LECs have a much poorer track record of extending telephone service into schools, even though they have

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[37]See, e.g., Comments of the Alliance for Communications Democracy; the City of Ann Arbor, Michigan; the City of Fort Worth, Texas; Montgomery County, Maryland; and Somerville Community Access Television at 3-11 (Dec. 16, 1994); Reply Comments of the Alliance for Communications Democracy; the City of Ann Arbor, Michigan; the City of Fort Worth, Texas; Montgomery County, Maryland; Somerville Community Access Television; the City of Waco, Texas; and the City of Wadsworth, Ohio at 2-6 (Jan. 17, 1995).

[38]Only 12% of classrooms nationwide are connected to telephone lines. See Rochelle L. Stanfield, Washington Update, National Journal, Dec. 3, 1994, at 2849. By contrast, most cable franchises include hookups for all schools.

[39]See, e.g., sample franchise terms summarized in Appendix A.

had decades to do so. Perhaps sensing this shortcoming, LECs like Bell Atlantic, for example, have recently made much of their desire to assist schools by installing video hookups. This generous offer masks the fact that for such institutions to be able to afford to make any actual use of the hookup, service must be provided at low or no cost, something LECs have refused to do. Instead, the LECs propose monthly charges for live connection and/or for specific programming from a customer-programmer on the network, charges that may well be prohibitive for ever-tightening school budgets.[40] Cable franchises negotiated by local communities, in contrast, typically provide not merely for free installation, but for free service as well.[41]

Nor are schools the only vital access ramps required for the information highway to be accessible for all public needs. Other local government functions -- emergency services such as police and fire, citizen and consumer information, and other agencies -- also benefit the public, and the public is better off when these agencies can place their information on the network and thus make it more widely available.

Further, if the information highway is not to become a private driveway carrying only the voices of the privileged few, ordinary citizens and nonprofit groups must have a realistic ability to engage in First Amendment speech over local broadband

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[40]In Maryland, Payment Option A is $1,365 per month in the first three years and $2,730 per month thereafter. Payment Option B is $2,135 per month at all times.

[41]See, e.g., sample franchise terms summarized in Appendix A.

video delivery systems. The public interest in communications democracy -- promoting the wide participation of all people in communication, not only as receivers but as transmitters of information and ideas -- requires the Commission to ensure that noncommercial customers, including public, educational, and governmental users, have effective access to video dialtone systems. Subscribers to the service need to be able to send as well as to receive information. Otherwise, the information highway will be merely a one-way conveyor belt dumping information into the home. Yet the cost of the equipment and facilities necessary to produce video programming, and the level of technical expertise required to originate such programming, make such origination impractical for most individuals and many non-profit institutions.

Again, the local franchising process provides a solution to this problem. Through PEG access requirements, local governments can and do negotiate for publicly available facilities and assistance for programming -- "video phone booths" to be used by those not well-heeled enough to obtain capacity commercially from the cable or video dialtone operator.[42] PEG provisions in franchises foster diversity in speech over the system and provide to ordinary citizens, universities, schools and local governments the means to access that system.

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[42] Cf. NLC Address ("Once we do network our schools, they will become community interchanges on the information superhighway").

Because they have been exempted from the Cable Act, the video dialtone systems proposed to date do not offer such benefits. Local cable franchising, in contrast, allows communities to negotiate for such facilities and services when and where they are needed. It would be impossible for the Commission to take over the role of ensuring adequate PEG access requirements nationwide -- and thus irresponsible for the Commission to attempt to prevent local communities from negotiating such requirements.

C. The Local Franchising Process Serves to Prevent Redlining and Discrimination.

There is no guarantee that a video dialtone operator's incentive to provide service where it is most profitable will always yield service when and as the public interest requires. By specifying construction schedules, local franchise agreements with cable operators address the problem of which areas need to be served in what order, and on what schedule service will be extended where needed.[43] Negotiations between the operator and the local authorities provide a means to coordinate planning for construction and to ensure that local needs and interests are met.

Specifically, franchise agreements almost invariably deal with "redlining," or exclusion of lower-income neighborhoods and regions. For example, cable franchise agreements prevent redlining by establishing uniform density requirements for build-

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[43]See 47 U.S.C. §§ 541(a)(3)-(4), 552(a)(2).

out of entire franchise areas. By contrast, although some video dialtone applications have expanded the scope of the coverage initially planned, apparently in response to concerns about redlining,[44] local communities' concerns remain. For example, in Baltimore County, it appears that Bell Atlantic plans to provide video dialtone service only in the more affluent western and central parts of the County, at least initially. In contrast, the local cable operator, Comcast, provides service almost everywhere in the County.

While the Commission agrees that redlining issues "deserve serious consideration," and entertained comments on these issues in July, 1994, it has so far adopted no rules or conditions for video dialtone operators regarding redlining.[45] The difficulty the Commission is apparently experiencing in addressing this problem is most likely related to the inherently local, neighborhood-specific nature of the redlining issue, which the

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[44]See, e.g., In re Application of the Chesapeake and Potomac Telephone Companies of Maryland and Virginia for authority pursuant to Section 214 of the Communications Act of 1934, as amended, to construct, operate, own, and maintain, facilities and equipment to provide a commercial video dialtone service within a geographic area defined by the Maryland and Virginia portions of the Washington Local Access Transport Area (LATA), W-P-C 6912, Amendment at 2-4, 11-13, 22, and Exhibit 1 (Jun. 16, 1994) ("Bell Atlantic Amendment").

[45]In May, 1994, a coalition of five consumer and civil rights groups filed petitions for rulemaking requesting the FCC to ensure, among other things, that video dialtone facilities are deployed in a nondiscriminatory manner and that services are made universally available. Comments were filed on July 12, 1994, and reply comments on July 27, 1994. The Commission has not yet acted on these petitions. See Second Reconsideration Order at ¶ 12 n.22.

Commission lacks the resources and local knowledge to resolve. That is precisely why this issue must be addressed at the local level, through the franchising process.

D. The Cable Act Permits Communities to Address Local Needs and Interests.

As the above examples show, to serve the public interest, as opposed to serving only the purely private interests of the operator, a wireline video communications system must be designed and operated to meet local, not merely national, needs and interests. The Cable Act was premised on this very fact.[46] The hallmark of the federal system in the United States is the recognition that some government functions must be addressed at the national level, while others involve problems and issues that differ from state to state and from city to city. A "one size fits all" blanket judgment from Washington cannot possibly deal adequately with all such needs and interests. Rather, regulation should be conducted at the local level wherever possible, and at state or federal levels only where necessary. This approach avoids unnecessary bureaucracy and maximizes self-determination.

The most effective, if the most mundane, example of this principle is the day-to-day management of the public rights-of-way by local authorities. As multiple users dig trenches, emplace conduits, string cable over streets, and dodge each other's installations, it is obviously essential that some agency

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[46] See, e.g., 47 U.S.C. §§ 521(2); 546(a)(1)(A) and (c)(2)(D). See also H.R. Rep. No 934, 98th Cong., 2d Sess., at 19, 24, reprinted in 1984 U.S.C.C.A.N.

on the spot coordinate the process to prevent conflicts and maximize efficiency (for example, through joint trenching). Just as the Commission itself oversees the nation's airwaves, each local government is responsible for ensuring the safe and efficient use of its rights-of-way. But construction permitting and safety issues cannot be handled for the entire nation from Washington. For example, local streets and neighborhoods differ, and only local authorities are sufficiently familiar with local needs to tailor local street use to those needs. Hours of maximum usage, working conditions in and around the site, noise requirements, the location of other public facilities such as storm drains and sewers, and the type of treatment required to keep the road from buckling all differ from site to site. Similarly, inspection and enforcement, along with issues regarding insurance and indemnification with regard to activities in the rights-of-way, appropriate restoration, and undergrounding -- particularly where historic districts or similar local characteristics impose special requirements -- are best handled at the local level. Local authorities are the ones who must respond to any problems such as broken gas or water mains in the public rights-of-way, bear the cost of police, fire, and rescue services, and deal with citizen complaints.[47]

Community-specific issues also arise in the context of customer service. For example, are existing office locations sufficiently convenient for end-users, given any local

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[47] See 47 U.S.C. § 541(a)(2).

alternatives (such as arrangements with other local vendors, such as banks or convenience stores, as contact locations for paying bills or exchanging set-top boxes)? These are matters that must be tailored at the local level.

Because the Commission is ill-equipped to fashion public interest obligations responsive to local needs and interests, local governments are the only possible mechanism to ensure that a video dialtone provider, like its traditional cable competitor, is obliged to address local needs and interests. Those needs and interests are not merely what the video dialtone provider imagines those interests to be, nor what the Commission imagines them to be, but what the local community itself, through its elected representatives, determines them to be.

The Cable Act, of course, provides just such a framework to protect local needs and interests. It reflects a careful balancing, empowering local governments to impose certain requirements while limiting their authority in other areas.[48]

The Coalition is aware, of course, that the LECs will argue they cannot afford to deal with a "patchwork" of local communities. The LECs wish to be allowed to use public rights-of-way to proceed on an abstract, nationwide basis <u>regardless</u> of the actual needs of the community. Such an argument indicates

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[48]<u>Compare</u>, <u>e.g.</u>, 47 U.S.C. § 531 (allowing franchising authorities to require PEG access capacity), § 542 (allowing 5% franchise fee), § 544 (allowing regulation of facilities and equipment) <u>with</u> § 532 (limiting local authority over leased access), § 543 (limiting rate regulation), § 545 (allowing franchise modification), § 546 (placing federal requirements on franchise renewal).

that the LECs have no intention of meeting local needs and interests.

More fundamentally, the LECs' argument overlooks the obvious: The cable industry has managed to address local needs and interests through the local franchise process, and it has rapidly grown and flourished while doing so. Small LECs that have been subject to the rural exemption have also managed to satisfy the local franchising process. It is difficult to take seriously the notion that large LECs like the RBOCs are somehow unable to cope with the franchising process when traditional cable operators and small LECs have already done so. In fact, local property negotiations are a normal part of doing business for any national enterprise, whether McDonald's, UPS, or an RBOC.

V. THE COMMISSION MUST COMPLY WITH FEDERAL LAW AND REQUIRE TELEPHONE COMPANIES THAT PROVIDE VIDEO PROGRAMMING TO OBTAIN A FRANCHISE.

The Cable Act requires self-programming video dialtone operators to obtain local franchises. As the preceding analysis shows, this requirement is not some mere technicality that should be sidestepped if possible. Rather, it reflects the judgment of Congress that any system providing video programming directly to the home must be responsive to local needs and interests. Because the needs of each community differ, the FCC is simply not equipped to provide such protection. It should hardly be surprising, then, that the Cable Act applies to a self-programming video dialtone operator.

A. The Cable Act Requires a Self-Programming Video Dialtone Operator To Have a Cable Franchise.

The Fourth FNPRM inquires whether a LEC providing cable service as a traditional cable operator, or video programming over a video dialtone system, is subject to Title VI of the Communications Act (the Cable Act).[49] The Commission's own analysis in the First Report and Order makes clear that any LEC that provides video programming directly to subscribers over its own system is a "cable operator" and thus is subject to the Cable Act, whether it operates a traditional cable system or a video dialtone system. In particular, such a self-programming operator is subject to § 621(b)(1), which requires that a cable operator (except in certain narrowly defined cases) may not provide cable service without a franchise.

1. A self-programming video dialtone operator is a "cable operator".

A self-programming video dialtone operator's obligations under the Cable Act are based on the application of three Cable Act definitions: "cable service," "cable system," and "cable operator."

The provision of video programming to subscribers over a video dialtone system is clearly "cable service" within the meaning of § 602(6) of the Cable Act.

> [T]he term "cable service" means --
> (A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and

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[49] Fourth FNPRM at ¶¶ 14-15.

> (B) subscriber interaction, if any, which is required for the selection of such video programming or other programming service;[50]

Since a self-programming video dialtone operator would be transmitting video programming to subscribers, it would clearly provide "cable service" within the meaning of § 602(6)(A)(i). Indeed, if it were not providing "cable service," a video dialtone system could not compete with traditional cable operators. Yet such competition is a key purpose for which the Commission created video dialtone.[51]

The questions then becomes whether, when a video dialtone operator programs or makes programming decisions over any part of its system, such a self-programming video dialtone operator's network becomes a "cable system" within the meaning of § 602(7) of the Cable Act:

> [T]he term "cable system" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include . . . (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of subchapter II of this chapter, except that such facility shall be considered a cable system (other than for purposes of section 541(c) of this title) to the extent such facility is used in the transmission of video programming directly to subscribers; . . . [52]

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[50]47 U.S.C. § 522(6).

[51]See sources cited at n.13 supra.

[52]47 U.S.C. § 522(7).

Application of this complex definition to a self-programming video dialtone operator requires a three-step analysis. (i) Is the system a facility of the type described? (ii) If so, does it fall within the common carrier exception (C)? (iii) If it falls within exception (C), is the facility used in the transmission of video programming directly to subscribers?

(i) Since a self-programming video dialtone system provides cable service, as noted above, it falls squarely within the first part of the Cable Act's definition. Indeed, most video dialtone systems so far proposed to the Commission in § 214 applications are technically indistinguishable from contemporary cable systems.[53]

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[53]See, e.g., In re Application of the Southern New England Telephone Company for authority pursuant to Section 214 of the Communications Act of 1934, as amended, to construct, operate, own, and maintain, facilities to test a new technology for use in providing video dial tone service in a specific area in Connecticut, W-P-C 6858, Application at 1 (Apr. 27, 1993); In re Application of Rochester Telephone Corporation for Authority Under Section 214 of the Communications Act of 1934, as amended, to Construct, Operate, Own and Maintain Facilities To Conduct a Market Test of Video Dialtone Service In a Defined Area in Rochester, New York, W-P-C 6867, Application at 4 (Jun. 18, 1993); In re Application of U S West Communications, Inc. for Authority Under Section 214 of the Communications Act of 1934, as amended, to construct, operate, own and maintain facilities and equipment to provide video dialtone service in portions of the Omaha, Nebraska service area, W-P-C 6868, Application of U S West Communications, Inc. at 2 (Jun. 22, 1993); Bell Atlantic Amendment at 2-4, 14-15; In re Application of Ameritech Operating Companies for Authority pursuant to Section 214 of the Communications Act of 1934, as amended, to construct, operate, own, and maintain advanced fiber optic facilities and equipment to provide video dialtone service within geographically defined areas in Illinois, Indiana, Michigan, Ohio, and Wisconsin, W-P-C 6926-6930 at ¶ 4 (Jan. 4, 1995) (proposing hybrid fiber-coaxial systems).

(ii) The LECs for which the Commission created video dialtone are already common carriers presumably subject, at least in part, to the provisions of Title II of the Communications Act. Thus, it may be assumed for the sake of argument that the initial language of exception (C) applies in part to the facilities of a self-programming video dialtone operator.[54]

(iii) By its terms, however, exception (C) does not apply "to the extent such facility is used in the transmission of video programming directly to subscribers." This is the exact description of a self-programming video dialtone operator. Thus, exception (C) does not exempt such a video dialtone operator, and therefore the self-programming video dialtone operator's system is a "cable system."

It is important to note that the language of § 602(7)(C) specifically contemplates a "hybrid" system, i.e., a system that is both a common carrier facility and a cable system at the same time. Thus, LECs who wish to program part of their systems cannot plausibly claim that their video dialtone systems are not "cable systems" simply because they also happen to offer part of their system capacity on a common carrier basis. On the contrary, the Cable Act explicitly contemplates hybrid

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[54]It is equally clear, however, from this definition that a system belonging to a cable operator (as opposed to a LEC) that wished to qualify as a video dialtone operator would not cease to be a "cable system" under this exception unless the cable operator both (a) transformed itself into a common carrier exclusively, subject only to Title II; and (b) completely ceased providing video programming directly to subscribers -- each of which is a highly unlikely possibility.

cable/common carrier systems, and states that such systems shall be considered cable systems.[55]

Once the "cable service" and "cable system" definitions have been applied, it is clear that a self-programming video dialtone operator is a "cable operator":

> [T]he term "cable operator" means any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system.[56]

The self-programming LEC would be providing cable service over a cable system, and thus would satisfy condition (A) of this definition. Since it would also control and manage the system, it would satisfy condition (B) as well.

2. Provision of video programming through an affiliate does not insulate a cable operator from this legal requirement.

A LEC seeking to avoid being considered a cable operator could, of course, create an affiliate to handle the actual selection of programming and argue that the affiliate providing programming to subscribers did not itself own the video dialtone system. However, the language of the Cable Act renders such a device pointless: "cable operator" includes "any person or group

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[55]See 47 U.S.C. §§ 522(7)(C) and 541(d)(2). It should also be noted that even traditional cable operators are required to set some of their capacity aside for use by unaffiliated programmers, see 47 U.S.C. §§ 531-532, resulting in a balance of programming control similar to what may be expected from self-programming video dialtone operators.

[56]47 U.S.C. § 522(5).

of persons" that owns a significant interest in the system "directly or through one or more affiliates."[57]

Indeed, the inclusion of affiliates is essential to the purpose of the provision. If the mere separation of system ownership and program management by creation of corporate affiliates were sufficient to escape the reach of these definitions, any existing cable operator could have evaded the responsibilities of a "cable operator" under the Cable Act at any time since 1984 simply by setting up such an affiliate. A definition whose reach could be evaded in this manner would serve no imaginable purpose. Congress anticipated such a ruse in the "affiliate" language in the Cable Act, and treated involvement by way of an affiliate as equivalent to direct involvement by the underlying facilities provider itself. Similarly, the Commission itself recognized in the Second Reconsideration Order (at ¶ 69) that "LECs cannot avoid ownership limitation by using intervening corporate entities."

For this reason, it would be wholly beside the point for a LEC to argue that its programming subsidiary was just another customer/programmer of the video dialtone system, taking service on the same terms as any other customer. Whether or not such a subsidiary purchased service on the same terms as other

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[57]47 U.S.C. § 522(5)(A) (emphasis added).

customers, for purposes of the Cable Act definitions it must be treated as equivalent to its LEC parent.[58]

3. The Commission's and the court's interpretations of the Cable Act reach the same result.

As shown above, the plain language of the statute leaves no doubt that a self-programming video dialtone operator is a "cable operator." Indeed, the Commission itself, as well as the Court of Appeals, relied on this very interpretation of the Act in previously concluding that a video dialtone operator is not a cable operator as long as it neither provides programming nor makes programming decisions.

The Commission's original conclusion that the Cable Act required neither a video dialtone operator, nor its customer-programmer, to obtain a franchise was founded on the assumption that the LEC would be involved exclusively in carriage and would hold no significant interest in any programmer on the system. The Commission said:

> A LEC providing video dialtone service does not fall within this definition because the LEC itself is not providing the video programming service directly to

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[58]Indeed, the statutory cross-ownership ban itself makes patently clear that LEC affiliates must be treated as extensions of the parent LEC for purposes of determining when an LEC violates the ban. 47 U.S.C. § 533(b)(1) and (4). While the statutory prohibition may itself no longer be enforceable due to the court decisions striking it down, the statutory language is nonetheless instructive, because it reveals Congress' unequivocal intent, in connection with telephone company provision of video services, to treat LECs that provide programming through their own affiliates as indistinguishable from cable operators.

> subscribers. Rather, the LEC is simply acting as a conduit . . . [59]

> We also conclude that the LECs' customer/programmers for video dialtone service are not required to obtain a local cable television franchise under Section 612(b). Because they neither own a significant interest in the telephone company broadband facilities, or control, or are responsible for the management and operation of those facilities, the customer/programmers also do not qualify as cable operators under the Cable Act definition.[60]

Similarly, the Commission's reconsideration of the franchising issue in August, 1992, was premised on a complete separation of ownership between the video dialtone operator and any entity involved in program selection:

> This new option, which we call video dialtone, would separate control over the creation, selection, and ownership of video programming from control over the facilities . . . We find that Congress did not intend to require that an entity obtain a cable television franchise when it is not providing video programming directly to subscribers . . .[61]

It follows that when the LEC does provide video programming directly to subscribers as a self-programming video dialtone operator would, it must obtain a cable franchise.

The Commission also argued in the First Reconsideration Order that a (pure) video dialtone operator was not providing

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[59]First Report and Order at ¶ 51.

[60]Id. at ¶ 52.

[61]In re Telephone Company--Cable Television Cross-Ownership Rules, Sections 63.54 - 63.58, CC Docket No. 87-266, Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd. 5069 at ¶¶ 10-11 (1992) ("First Reconsideration Order"). See also U S West, No. 94-35775, slip op. at 15889 ("The FCC has concluded that such video dialtone services do not violate § 533(b) so long as the telephone company does not provide the programming material").

cable service, because the term "transmission" in the definition of "cable service" required "active participation in the election and distribution of video programming."[62] According to the Commission, the video dialtone operator would not be providing cable service in this situation, because selecting and providing the video programming to be offered were "functions foreclosed to the telephone company under the video dialtone policy we adopt today."[63] Since a self-programming video dialtone operator would perform exactly those functions, either itself or through an affiliate, the Commission's "transmission" argument would also fail to apply.

In fact, the Commission addressed the case of the self-programming video dialtone operator directly when it parsed the "cable system" definition in the First Reconsideration Order:

> [W]e conclude that the exception to the common carrier exemption for facilities "used in the transmission of video programming directly to subscribers" applies only when a local telephone company is acting like a cable operator by providing cable service. Thus, to the extent a telephone company is explicitly permitted by the Cable Act to provide video programming directly to subscribers (e.g., subject to waiver or the rural exemption), it falls within the regulatory scheme set forth in the Cable Act, including the requirement that it obtain a cable television franchise. On the other hand, an entity not providing video programming directly to subscribers, including a local telephone company offering video dialtone (that is prohibited from providing video programming directly to subscribers), would be exempt from such regulation.[64]

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[62] Id. at ¶ 16.

[63] Id. at ¶ 18 (emphasis added).

[64] Id. at ¶ 23 (emphasis added). See also id. at ¶ 24 n.38.

By combining programming decisions and facilities ownership under the same corporate umbrella, a self-programming video dialtone operator would violate this principle. Like a traditional cable operator, it would combine both conduit and content functions. If earlier Commission and court decisions mean anything, they mean that when the same entity provides carriage and makes programming decisions (even through an affiliate) for any part of the system, that entity is a cable operator providing cable service over a cable system, and hence is subject to the Cable Act.

The D.C. Circuit's decision upholding the Commission's earlier video dialtone decision similarly relied on the complete separation of program selection from carriage. The court agreed with the Commission that a (pure) video dialtone operator fell within the common carrier exemption in the definition of "cable operator," and that exception (C) to that exemption did not apply precisely because the LEC provided no programming:

> A telephone company providing video dialtone service to programmers is prohibited from providing video programming directly to subscribers, see First Report and Order, 7 FCC Rcd. at 312; therefore the exception does not apply.[65]

The court likewise accepted the Commission's interpretation of "transmission" (and thus of "cable service") as involving program selection, and based its ruling on the fact that, under the Commission's original video dialtone ruling, the LEC could

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[65]NCTA, 33 F.3d at 74 (emphasis added).

not select or provide the programming and thus would not "transmit" that programming:

> That a telephone company may provide unregulated enhanced services under its video dialtone authorization does not mean that it will engage in the "transmission of video programming" as contemplated by the Act; in fact, a telephone company providing video dialtone service is prohibited from providing video programming directly to subscribers.[66]

Thus, it was only the prohibition against self-programming that allowed the Commission and the NCTA court to reach the conclusion that the franchising requirement of the Cable Act did not apply to pure video dialtone systems. To the extent that the Commission would now permit a video dialtone operator to program part of its system, the operator could no longer fit the narrow exception constructed in the First Report & Order and upheld in NCTA. Rather, the Commission's own standard, affirmed by the court, is that any video dialtone operator that programs any part of its video dialtone system is a cable operator and subject to Title VI.

B. The Court Decisions Regarding the Cross-Ownership Ban Do Not Permit Cable Operators or Telephone Companies to Offer Cable Service Without a Cable Franchise.

The recent court decisions striking down the cross-ownership ban on First Amendment grounds have no effect on the video dialtone analysis. Rather, those decisions simply created another way, much like the statutory rural exemption (but, of

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[66] Id., 33 F.3d at 72 (emphasis added).

course, far broader in scope), in which a telephone company may become a cable operator subject to the Cable Act. No one has ever suggested that a telephone company providing cable service under the rural exemption, or by waiver under 47 U.S.C. § 533(b)(4), was not subject to the local franchise requirement of § 541(b).[67] Nor could it seriously be suggested that if a telephone company acted through a separate subsidiary to provide cable service under the rural exemption (as is often the case), such a corporate structure would somehow prevent the Cable Act from applying. Accordingly, the First Amendment cases merely create another way, like the rural exemption, in which a telephone company may provide video programming directly to subscribers, thereby subjecting itself to the franchising requirement of the Cable Act.

1. The First Amendment decisions merely prevent the Commission from enforcing the cross-ownership ban.

The Commission has suggested that the recent First Amendment decisions striking down the telco-cable cross-ownership ban might require the Commission to allow video dialtone operators to provide programming over their own systems; yet the Commission has failed to require such operators to obtain a local franchise. The Commission thus apparently assumes, for all practical purposes, that the resulting hybrid system might still be

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[67] Cf. Brief for Respondents at 25 n.24, NCTA v. FCC, 33 F.3d 66 (D.C. Cir. 1994) (No. 91-1649) ("The Commission does not suggest that a common carrier cannot provide cable service," citing rural exemption as an example).

exempted from the Cable Act.[68] The assumption is unwarranted. To be sure, the First Amendment decisions hold that the Commission cannot prevent a telephone company from providing video programming directly to subscribers (and thus, as shown above, from becoming a cable operator). But those decisions do not suggest that a LEC must necessarily do so under the Commission's video dialtone rules, much less that a LEC may do so without a cable franchise. On the contrary, the court decisions assume that a self-programming LEC is a cable operator.

2. The First Amendment decisions do not affect the franchising requirement of the Cable Act.

It is necessary first to emphasize what should be obvious: None of the First Amendment decisions addressed at all the local franchise requirement of the Cable Act, 47 U.S.C. § 541(b). The only section affected by those decisions was the telco-cable cross-ownership ban, 47 U.S.C. § 533(b)(1). Thus, the franchising requirement of the statute remains in force, and the Commission has no power to overrule it. The First Amendment decisions merely mean that the Commission may no longer prohibit local telephone companies from obtaining local franchises and providing cable service in their local telephone service areas.

Thus, there is no conflict at all between the First Amendment decisions and the Commission's earlier ruling that telephone companies providing (pure) video dialtone are not

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[68] See Second Reconsideration Order at ¶ 15, ¶ 37 n.39; Bell Atlantic Authorization at ¶ 24. The decisions relating to the cross-ownership prohibition are listed at note 3 supra.

subject to the franchising requirement of the Cable Act. The First Amendment decisions merely give telephone companies the option of seeking local franchises under Title VI as opposed to becoming video dialtone providers.

3. The First Amendment decisions assume the LEC would obtain a cable franchise.

The first of the telco-cable cases was brought by Bell Atlantic affiliates on December 17, 1992, after the adoption of the Commission's video dialtone rules. In that case, however, Bell Atlantic did not propose to create an unfranchised video dialtone system to provide video programming directly to subscribers. Rather, as the C&P court noted, Bell Atlantic proposed a cable system.[69]

Subsequent decisions on the telco-cable ban have closely followed the reasoning of the C&P decision, and have generally treated the issue as one of the LECs' potential entry into the cable business. Thus, for example, the Fourth Circuit's decision affirming the initial C&P decision notes Bell Atlantic's request for a cable franchise from Alexandria and speaks consistently in terms of Bell Atlantic's interest in "operating a cable system."[70] Moreover, the Fourth Circuit explicitly characterized the video dialtone rules as allowing "telephone companies to transmit, without any editorial control, the video programming of

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[69]See C&P, 830 F. Supp. at 911.

[70]See, e.g., Chesapeake & Potomac Telephone Company of Virginia v. United States, 42 F.3d 181 (4th Cir. Nov. 21, 1994), slip op. at 7-8 & n.4.

unaffiliated cable operators," and distinguished video dialtone from the First Amendment issue before it relating to provision of cable service:

> The First Amendment's problem with Section 533(b) is that the provision does not allow the telephone companies to engage in protected speech, that is, the provision, with editorial control, of cable television services.[71]

Thus the Fourth Circuit, too, takes it as obvious that a LEC's exercise of any editorial control over the transmission of video programming, whether through an affiliate or otherwise, renders it a cable operator.

In the same way, the other First Amendment cases on the cross-ownership ban raise no suggestion that a LEC could possibly provide video programming directly to subscribers without being subject to the Cable Act. Either they clearly assume that the LEC will obtain a cable franchise, or they do not refer to the issue at all.[72] In no case do the decisions suggest that the First Amendment would allow LECs to compete with traditional cable operators in the market for selection and provision of

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[71] Id., slip op. at 14 n.10 (emphasis in original).

[72] See, e.g., Ameritech, 1994 U.S. Dist. LEXIS 15512 at *17 (plaintiffs challenged statute "as it applies to bar specific cable television ventures" they would launch); NYNEX, Civil No. 93-323-P-C, slip op. at 1 (§ 533(b) bars telephone companies from entering "the cable television market"); U S West, No. 94-35775, slip op. at 15896-97 (First Amendment analysis relies on the absence of scarcity in "the cable television industry"), 15904 ("fostering competition in the cable industry" is a substantial government interest), 15905 and 15908 (distinguishing competition under video dialtone in the video transport market from competition in providing programming); BellSouth, No. CV 93-B-261-S, slip op. at 4 (same analysis re scarcity); USTA, CA No. 94-1961, bench ruling, transcript at 34 (same).

video programming without being subject to the same Cable Act obligations and responsibilities that apply to traditional cable operators.

The Commission has a very simple means of complying fully with these First Amendment decisions: allowing LECs to apply for cable franchises in their local telephone service areas.[73] As long as the FCC does not deny LECs the option of becoming cable operators subject to Title VI, the FCC has satisfied its First Amendment obligations.

4. A LEC may be subject to regulation both as a common carrier and under the Cable Act.

There is no conflict in applying the requirements of the Cable Act to a self-programming video dialtone operator while, at the same time, subjecting it to common carrier regulation under Title II. Unless a statute expressly exempts an entity in one category from regulation in a second category, the entity is subject to regulation in both.[74]

To the extent that there may be any regulatory duplication in such a situation, that result would be created by the Commission's own video dialtone rules requiring a telephone company to offer some video capacity on a common carrier basis.

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[73]The Commission appears to have adopted, on an interim basis, a policy of not preventing most telephone companies from constructing or acquiring cable systems in their local service areas. Public Notice, Commission Announces Enforcement Policy Regarding Telephone Company Ownership of Cable Television Systems, DA 95-520 (Mar. 17, 1995).

[74]See, e.g., Souris River Telephone Mutual Aid Corp., FCC 60-254, 28 FCC 275, 19 R.R. 1117 (1960).